

# The Solicitors' Journal

VOL. LXXXVI.

Saturday, March 14, 1942.

No. 11

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*Editorial, Publishing and Advertisement Offices*: 29-31, Breams Buildings, London, E.C.4. Telephone: Holborn 1403.

**SUBSCRIPTIONS**: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.

**Annual Subscription**: £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy*: 1s. 4d., *post free*.

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## Current Topics.

### Law for Guerrillas.

In the course of a debate on the Home Guard in the House of Lords on 4th February, LORD MOTTISTONE said that "the man who lies on his sofa when the sudden onslaught comes is committing a crime against the law of the land . . . By the law of the land, whenever an enemy suddenly appears, every able-bodied man is bound to leave his sofa, spring to his feet, and by every possible means in his power join with others in repelling the enemy . . . Not only is a man entitled to do it by international law, but by the law of England he is bound to do it." While no one with any courage doubts what he will do on the sudden appearance of the enemy, it does not follow that the noble lord's statement ought to be accepted on a pure question of law without further inquiry. "Blackstone" (8th ed. I, 257, 258) makes it quite clear that war is a matter for the sovereign and not for private individuals to declare, but "all parts of the contending nations, from the highest to the lowest, are bound by it." This hardly goes the length of LORD MOTTISTONE's statement and, in any case, this country has since Blackstone's time become a signatory to Hague Conventions, by which it is bound. The rule now is that irregulars enjoy the privileges due to members of armed forces even if not acting under authorisation if (1) acting under a person responsible for his subordinates; (2) bearing a fixed, distinctive and recognisable emblem; (3) carrying arms openly; (4) conducting operations according to the laws of war. On a sudden invasion a hasty levy *en masse* is authorised, although the organisation is not completed or the fixed emblems not ready. After an enemy occupation is completed, a levy *en masse* is illegal. The law, therefore, is that if a non combatant wishes to join with others in repelling the enemy, he must comply with these rules, as otherwise he renders himself liable to be shot out of hand on capture, as the Germans, always scrupulous as to the strict observance of the law by others than themselves, shot the *franc tireurs* of 1870. When faced with a foe who tears into tatters every shred of international law and decency, no one doubts what his duty to his country, his family and himself requires. One does not stop to consider nice questions of law when confronted with a pack of wild animals, or even when faced with a pack of human beings who have reverted to the animal state. In such a case the higher law, which seeks to preserve all that makes life worth living, becomes paramount over all other considerations.

### Shortage of Magistrates.

Sir BERTRAND WATSON, Chief Metropolitan Magistrate, stated at Marlborough Street Police Court on 5th March that the metropolitan police courts were working under great difficulties, and great public inconvenience was being caused owing to a serious shortage of London magistrates. At the moment, he said, they were four short of the statutory numbers. The vacancies had existed for nearly three months, and, most unfortunately, four of the magistrates were away sick. One of those who was unable to sit owing to illness was Mr. SANDBACH, whose place the Chief Magistrate was taking, and it was necessary to adjourn a number of part-heard cases. There is very little excuse for the Home Office keeping down the number of magistrates in a busy area like London for so long a period as three months. The administration of justice is as important as any other branch of government, whether in peace or in war, and indeed government at any time is impossible without it. Any diminution in its striking power cannot but have serious repercussions, and it is unfortunate enough that there is an unavoidable shortage of solicitors and barristers, without allowing an artificial shortage of magistrates to arise, so as to cause undue delay in the administration of justice. There should be no difficulty in finding

candidates to fit the vacant offices, as many competent silks are now finding that they are not so busy as their juniors. Any underestimation of the vital importance of the administration of justice in the framework of good government constitutes a strong reflection on those responsible for such an attitude.

### Requisitioned Land : Landlord and Tenant.

In moving the second reading in the House of Lords of the Landlord and Tenant (Requisitioned Land) Bill on 3rd March, the Lord Chancellor stated that it came to the House with the unanimous support of the House of Commons. He referred to the report on requisitioning by MR. JOHN MORRIS, K.C. (Cmd. No. 6313, 1941), and said that the country owed a real debt of gratitude to him for a very good piece of work. His lordship said that compensation on the basis of the annual value at the time of the requisitioning was perfectly fair, but that there were individual cases where the tenant felt it a hardship because the lease under which he held the premises might provide for a rent which was larger than the annual payments which he is going to receive from the authorities. It might be that the value of the premises had gone down, or be less than what the tenant was originally willing for some other reason to pay. The Government had adopted Mr. MORRIS's recommendation that disclaimer should be permitted to tenants in occupation of business or residential premises, subject to the safeguard that it should only be permitted where the lease has not more than five years to run. This was because his view was that if there was a long lease it would be wrong so to re-distribute the burden between landlord and tenant, when in all probability there would be a large value left in the lease in the hands of those who possess it long after the war is finished. That, in brief, described the nature of the provisions in cl. 1 to 6. Clause 7 provided that even where a tenant was dispossessed by requisition, the rent payable might be adjusted by cutting out that portion of the rent which represented payment for services which the landlord had previously agreed to render but was no longer going to render. It was also provided that the landlord should be relieved of any obligation to supply the services to the tenant. The Lord Chancellor closed by quoting from Mr. JOHN MORRIS's report his statement that "the healthy reluctance of the British people to tolerate any Government encroachments upon private liberties is tempered in war-time by a willingness to co-operate to secure the necessities of national defence." The Bill was read a second time and committed to a committee of the whole House.

### Theft-bote.

An example of the interesting offence of theft-bote recently occurred in a case at Leeds Assizes (*R. v. Newson, The Times*, 6th March). A young girl had been sentenced to three years detention in a Borstal institution for a breach of recognisance by stealing large quantities of cigarettes and tinned fruit from the defendant. The probation officer had found the girl employment at the defendant's home as a domestic servant, but some months later the defendant found out that she had been pilfering, and dismissed her from his employment. The defendant, it was alleged, had entered into an agreement with the girl that she would pay him £8 in respect of his loss through her theft. The girl did not pay the money. Mr. Justice BIRKETT, who tried the case, remarked that the defendant went voluntarily to the police, produced the agreement, evidently expecting their approval, and was astonished to find that it was a criminal offence. He was sentenced to three days' imprisonment, which meant that he was at once released. Mr. Justice BIRKETT told him that he was leaving the court without a stain on his character. *The Times* records that the Oxford Dictionary's definition of theft-bote is "the taking of some payment from a thief to secure him from legal prosecution; either the receiving back by the

owner of the stolen goods or of some compensation, or the taking of a bribe by a person who ought to have brought the thief to justice." The leading definition is set out at 3 Co. Inst. 134, where the offence is said to be committed "where the owner not only knows of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him, to the intent that he may escape." Apparently, although the agreement in the recent case was not actually carried out, the offence was nevertheless complete, as it simply consists of making the agreement (*R. v. Burgess*, 16 Q.B.D. 141). The offence is usually described as compounding a felony, which is a misdemeanour at common law. The punishment for theft-bote is ransom (fine) and imprisonment.

### Value Payments : Proof of Title.

ONE of the noteworthy public services recently rendered by The Law Society is recorded in *The Law Society's Gazette* for February. As a result of a discussion with the War Damage Commission on the question of the steps which the Commission must take to satisfy itself as to the titles of claimants for value payments (War Damage Act, 1941, s. 9 (2) and (4)), it has been agreed that the Council will prepare for the approval of the Commission a precedent of a certificate as to title which might be completed by the solicitor to an applicant for a value payment, and that if that precedent were approved by the Commission, the Commission would, when sending their own forms to the applicant for completion, notify him that a certificate by his solicitor would be accepted as proof of title. The Council have accordingly prepared and the Commission have approved two forms of precedent, one for use where the applicant is the owner of a proprietary interest and the other where he is the mortgagee of such an interest. The Council recommends the following scale of charges as being fair to both the public and the profession, bearing in mind that solicitors' charges for preparing the claim are not recoverable from the Commission : where the value of the proprietary interest on 31st March, 1939, did not exceed £500, 1 guinea ; where such value was between £500 and £1,500, 2 guineas ; where such value was between £1,500 and £3,000, three guineas ; and where such value was over £3,000, item charges. Where an exceptionally large amount of work is entailed the solicitor will no doubt elect to be remunerated by item charges if he sees fit to do so. In most cases, however, it should be sufficient to peruse an abstract of the applicants' title or his land or (where the applicant is a mortgagee) charge certificate and any lease or tenancy agreement which the applicant may produce in response to a request for production of all deeds and documents in his possession affecting his title to the property. It will not be necessary to make searches in the Land Registry or local registries, as the Commission is making its own arrangements as to these searches. The precedents are published in the *Gazette* and are accompanied by useful notes of guidance.

### Assignments of Value Payments.

THE Council of The Law Society rendered a further service by inquiring of the War Damage Commission concerning the application of s. 46 (3) of the War Damage Act, 1941, which provides that where a property sustains war damage at a time when it is subject to a contract for sale or a notice to treat served under an enactment providing for its compulsory acquisition, any value payment or share thereof or payment under s. 15 payable to the vendor in respect of his interest shall be held by him in trust for the purchaser. The Council asked whether the Commission proposed to make the payment to the vendor or to the purchaser in a case to which s. 46 (3) applied, and whether they considered that it was necessary for any assignment to be executed in order that the payment might be made direct to the purchaser, or whether a notice given by the purchaser to the Commission stating his interest would be sufficient to enable the payment to be made to him. The War Damage Commission replied that they regarded the provision of s. 46 (3) as mandatory, and would accordingly pay the value payment to the vendor in the absence of a formal assignment by the vendor to the purchaser. In reply to further inquiries by the Council the Commission stated that they were prepared to regard assignments in cases covered by s. 46 (3) as normal, and that if the Council would submit a draft assignment for use by members of the profession as a precedent, it would be carefully considered. A draft assignment has now been settled with the Commission and is printed in the February issue of *The Law Society's Gazette*. Instructions will be given to Regional Managers of the Commission to accept notices of assignment made in the agreed form, to make a note of the assignment on the file relating to the property, and to acknowledge receipt of the notice. With a view to economy in stamp duty the assignment has been drawn as under hand only, and it is conceived that the document complies with s. 136 of the Law of Property Act, 1925 and the cases of *Jones v. Humphreys* [1902] 1 K.B. 10, *Forster v. Baker* [1910] 2 K.B. 636 and *R. v. Steel Wing Co.* [1921] 1 Ch. 349 do not prevent this, in the Council's opinion. The Council also holds that the assignment will not attract *ad valorem* stamp duty on a proper interpretation of s. 74 (1) of the Finance (1909-10) Act, 1910, and s. 46 (3) of the War Damage Act, 1941, but only (if under

hand) a stamp duty of sixpence. Assignments however require adjudication in accordance with s. 74 (2) of the Finance (1909-10) Act, 1910, notwithstanding that they do not attract *ad valorem* stamp duty (*Re Robb's Contract* (1941), 57 T.L.R. 660), though it is hoped soon to publish a statement on this decision as a result of communications with the Lord Chancellor's Department. Written notice to the Commission is required to comply with s. 136 of the Law of Property Act, 1925, and there must be strict compliance with paras. 3 and 6 of the War Damage (Notifications and Claims) Regulations, 1941. The Commission take the view that since, where the conditions of s. 46 (3) of the Act are satisfied, the payment is to be held by the vendor in trust for the purchaser, an assignment by the vendor to the purchaser is "an assignment which does not affect any beneficial interest" in the payment within s. 9 (7) and accordingly the approval of the Commission under that subsection is not necessary to its validity.

### Salvage of Waste Materials (No. 2) Order.

ALL who wish for a speedy victory will welcome and gladly obey the Salvage of Waste Materials (No. 2) Order made by the Minister of Supply on 25th February, 1942, under reg. 55 of the Defence (General) Regulations, 1939, "for maintaining supplies and services essential to the life of the community." The order specifies five acts which are prohibited except under the authority of a licence granted or a special or general direction issued by the Minister of Supply. The five prohibited acts are (a) destroying any waste paper (except for the purpose of preventing the spreading of any infectious or contagious disease or for the purpose of saving property from immediate danger of destruction or damage whether by fire or otherwise) ; (b) throwing out or abandoning any waste paper otherwise than by making it valuable for collection in accordance with the system of collection in operation in the district ; (c) disposing of any waste paper otherwise than to a collector or buyer thereof ; (d) putting any waste paper in a refuse bin or other receptacle for refuse ; and (e) mixing any waste paper with any material or article not being waste paper. The order expressly does not prohibit or restrict the use of any waste paper for any necessary or reasonable purpose, or the disposal of any waste paper to any person who requires it for such use or is believed on reasonable grounds by the person disposing of it to require it for such use. The order applies to everyone, including collectors and buyers. The term "waste paper" is defined as meaning any waste, scrap, worn-out or disused material or article, being paper or cardboard or an article made therefrom, but does not include any secret or confidential document. A "collector" is defined as meaning any person engaged in collecting waste paper whether or not by way of any trade or business or employment. The order came into force on 9th March. Solicitors will be particularly interested to note that the order does not apply to secret and confidential documents, but there is no reason why these should not be preserved for the national effort so long as their written contents can be as efficaciously destroyed as they are by the Waste Paper Recovery Association, of 169, Fleet Street, E.C.4, and its branches, to which we referred our readers last week (*ante*, p. 66).

### Recent Decisions.

In *Banku Polskiego v. K. J. Mulder and Co.*, on 27th February (The Times, 28th February), the Court of Appeal (the Master of the Rolls, MACKINNON and GODDARD, L.J.J.) held that where a bill was drawn in Poland, accepted in England and payable in Dutch currency in Amsterdam, the acceptance was not "qualified" within s. 19 of the Bills of Exchange Act, 1882, so as to make it payable in Amsterdam and not elsewhere.

In *Re General Mortgage Society (Great Britain), Ltd.*, on 2nd March (The Times, 3rd March), BENNETT, J., held that under r. 150 of the Companies Winding Up Rules, 1929, a creditor could appoint the Official Receiver as his proxy at a meeting to approve a scheme of arrangement under s. 153 of the Companies Act, 1929.

In *Steele v. Robert George & Co.* (1937), Ltd., on 4th March (The Times, 5th March), the House of Lords (the Lord Chancellor, LORD ATKIN, LORD WRIGHT and LORD PORTER), held that where in a case under the Workmen's Compensation Act, 1925, a workman had been advised against an operation by a skilled medical man in whom he had confidence, it would be necessary to bring home to the workman an extremely strong body of expert advice to the contrary before the onus which rested on the employer of showing that the workman's condition was due to an unreasonable refusal to undergo an operation should be regarded as discharged.

In *Benson v. Northern Ireland Road Transport Board*, on 4th March (The Times, 6th March), the House of Lords (the Lord Chancellor, LORD ATKIN, LORD WRIGHT and LORD PORTER), held that in an appeal by the prosecution against the dismissal with costs on the merits by magistrates in Northern Ireland of a charge of infringement of the Road and Railway Transport Act (Northern Ireland), 1935, s. 15, such an appeal could not be justified by the argument that an order against the prosecution to pay costs was an order for payment of a penal "or other sum" within s. 24 (1) of that Act, as it was an elementary principle of justice that there was no appeal against an acquittal.

## Criminal Law and Practice.

### *Certiorari and Appeal.*

To the mind of the lawyer practising in the courts of summary jurisdiction the remedy of *certiorari* is the last method that presents itself as a possible means of rectifying any injustice which he thinks has been done to his client. To say, however, that it is the last thing that occurs to his mind is not to say that it does not occur at all. It is not infrequently used, but the other remedies of appeal to quarter sessions and cases stated to the Divisional Court are more common. Indeed, where another remedy is available and proper, the court to which an application for a writ of *certiorari* is made will actually refuse the remedy by way of *certiorari*.

One of the points considered in *R. v. Wandsworth JJ., ex parte Read* (1942), 1 All E.R. 56, was whether the existence of other remedies excludes the possibility of obtaining a writ of *certiorari*. The charge was one of misrepresentation of the weight of meat offered for sale by means of false tickets. The tickets were not produced at the trial, and objection was taken to the adducing of secondary evidence of their contents. Having retired to consider whether the absence of the tickets was satisfactorily explained they returned into court and not only gave their decision on this question of evidence, but also proceeded to acquit the defendant on one summons and convict him on the other. The defendant was not heard.

The magistrates appeared by counsel on the hearing of the defendant's application for a writ of *certiorari*, and admitted through counsel that they had inadvertently been in error. Counsel, however, argued that the court had no power now to correct it. He said that the applicant's remedy was by way of appeal to quarter sessions or by way of case stated, and that the applicant had lost his opportunity of appealing because he was out of time, and he did not ask for a case to be stated upon a point of law, which would have given him his remedy in that court.

A passage was cited from the opinion of Lord Sumner in *R. v. National Liquors, Ltd.* [1922] 2 A.C. 128, at p. 151, in which his lordship said that it was clearly erroneous to say that want of evidence to convict was the same as want of jurisdiction to take evidence at all. "A justice who convicts without evidence," said his lordship, "is doing something that he ought not to do, but he is, doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."

The Lord Chief Justice said that this passage had nothing to say about a case such as this, where there had been a denial of natural justice to a party who had been convicted. His lordship said that he was entitled to look at an affidavit in such a case, as in the analogous case of want of jurisdiction.

With regard to the suggestion that the applicant had not the remedy by way of writ of *certiorari* because there was another remedy open to him, his lordship said that to ask the court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence was so extravagant a statement as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it might be that the applicant could have had his remedy if he had pursued it in that court, but his lordship was not aware of any reason why, in circumstances such as these, if the applicant preferred to ask for an order of *certiorari* to quash the conviction, the court should be debarred from making an order.

Humphreys, J., added a word on the question of the alternative remedies which might be open to the applicant. He said that as there was a denial of natural justice the applicant was entitled to the protection of the court. The only other question, therefore, was whether or not there was some other remedy, which, in the language of "Short and Mellor's Crown Office Practice," was equally convenient. There was no doubt ample authority for saying that the court would not grant orders of *certiorari* or *mandamus* where there was some other course equally open to the applicant. It was clear that there was no remedy by way of case stated, and as to appeal to quarter sessions his lordship took the view that this was not a case which was ever intended to be the subject of such an appeal. Primarily such appeals dealt with disputed questions of fact, although questions of law were not excluded. There was no reason why a person who had been wrongly convicted without evidence should assist the prosecution to go to some other tribunal, at which, it might be the prosecution might put their house in order. The applicant was entitled to his remedy by way of writ of *certiorari*. Wrottesley, J., agreed.

The decision establishes beyond doubt not only that *certiorari* is a remedy which is different from that of appeal, but that it is only applicable where there is no proper remedy by way of appeal. Under the circumstances of the case a remedy by appeal to quarter sessions would have enabled the prosecution to cure the very defect of lack of natural justice which gave the applicant his right to the writ of *certiorari*. The statement in "Willway on Quarter Sessions" (1940), at p. 321, that the rule that

*certiorari* will not be granted if there is a right of appeal is not so strict as in the case of *mandamus* (*R. v. Cambridgeshire JJ.* (1835), 4 A. & E. 121) must therefore now be qualified by the decision in *R. v. Wandsworth JJ.*

## A Conveyancer's Diary.

### *Profits à prendre.*

It will be remembered that I recently discussed at some length the cases which are authority for the proposition that an easement cannot exist but for the benefit and protection of land, or, in other words, that an easement must be supported by a dominant tenement. It was there shown that this doctrine is a salutary one and that like rules have been deliberately incorporated into the modern system of judge-made rules known as the law of restrictive covenants.

The underlying idea seems to be that it is best to control the extent of rights *in alieno solo* by relating any such right to a particular close. It will not be forgotten that the courts have been very jealous in support of the doctrine that covenants cannot run with the land unless they "touch and concern" the land: see, for example, *Re Ballard* [1937] Ch. 473.

It is accordingly strange that it seems to be accepted that a *profit à prendre* can exist in gross. An easement merely entitles A to do something on B's land, and a restrictive covenant entitles A to stop B doing something on B's own land. It has been thought necessary to keep such rights within bounds by the dominant tenement doctrine. But a *profit à prendre* entitles A to enter upon B's land and to take away something which is on that land or even to sever and bring away part of the very land itself. Such a right can apparently exist as an incorporeal hereditament in gross. But the peculiarity does not stop there; for it seems that if a *profit à prendre* is annexed to an estate, the extent of the right is conditioned by the requirements of the estate. Thus a profit can either subsist unsupported by any dominant tenement at all; or, if it is so supported, it is subject to the "touching and concerning" doctrine.

It will, perhaps, be convenient to give some account of *profits à prendre*. First, they are to be sharply distinguished from certain analogous rights. A profit is a right, otherwise known as a common, *in alieno solo*. Thus one may have a common of piscary in the non-tidal river of another. But if a river flows through my garden my right to fish in it (or to fish *ad medium filum* if my neighbour owns the other bank) is not a common or a profit, but a right of ownership, since the riparian owner owns the bed of the stream and can thus enter upon the water which lies above that bed. Conversely, rights of fishing in tidal waters are not profits, since they are either rights of all the King's subjects, or, if such a right is an exclusive one, it must be a right created by royal charter at a date before Magna Carta: such a right is known as a "free fishery."

Profits can be of divers kinds. Thus there is not only piscary, the right to take fish, but also turbary (to take turf), pannage (to feed pigs off fallen acorns and beechmast: see *Chilton v. Corporation of London*, 7 Ch. D. 562), pasture (to feed cattle) and estovers (to take wood). These are the ancient and simple profits; there may, of course, be more advanced ones which actually involve the commission of waste, as, for example, a right to dig minerals or gravel. According to Blackstone, the rights of turbary and estovers must be related to a dominant tenement, which must, in the case of turbary, be a house. But it seems to be accepted that a common of piscary may be in gross.

In *Harris v. Chesterfield* [1911] A.C. 623, the House of Lords had occasion to consider very fully the nature of a certain alleged right to fish in the River Wye. It was clear from the evidence that the plaintiffs were at least in possession (if not having the full fee simple) of the soil subjacent to a certain stretch of that river. It was equally clear that for at least three hundred years, and quite probably for over six hundred years, the owners from time to time of certain neighbouring freeholds had in fact exercised a "right" to catch from the river such salmon as they chose, without regard to the reasonable necessities of their respective tenements (assuming that it can ever be necessary for a freeholder to have a luxury like salmon). This supposed right was in fact treated as existing and as being a right "without stint." It appears that in an increasingly commercial age it was treated as a convenient way of making money, and it seems likely that the persons claiming the right presumed upon it so far that the owners of the river-bed finally felt that something must be done to control the number of salmon taken from the river. In any event, an action of trespass was brought and fought through all the courts. At the first stage, Neville, J., held that the right claimed by the defendants was legally capable of proof and had been proved. He therefore dismissed the action. On appeal, Cozens Hardy, M.R., Buckley, L.J., and Kennedy, L.J., held ([1908] 2 Ch. 397) that the alleged right was one for which the court could not presume a lawful origin, so that the appeal had to be allowed. It is important to notice that Buckley, L.J., made it clear that he was discussing the right on the footing that it was one which must stand or fall on the

question whether prescription in the *que* estate could be proved, and that it was impossible thus to prescribe for a commercial right whose extent would not be in any way limited by the requirements of the dominant tenement. He indicated that he was not considering any claim on the footing of custom, and also that "it may well be that there can exist in law a right in gross to enter and take without limitation—without stint—the profits or proceeds of another's land commercially for the purposes of sale" (p. 421). The defendants having, however, put their claim on the basis that the right enured for their respective benefits as owners of certain closes, could not succeed in claiming a right whose extent was in no way related to the requirements of such closes.

The case then went to the House of Lords where the question mainly considered was whether, assuming that the right was neither customary nor in gross, and assuming that if it existed it did not fall into any usual category of profits annexed to a dominant tenement, yet, since it had undoubtedly been enjoyed for many centuries, the House should or should not presume that it had had some legal origin. The basis of the argument in favour of a presumption of legal origin was the well-known case of *Goodman v. Sallash Corporation*, 7 App. Cas. 633, where the House had gone to considerable lengths in presuming a legal origin for a right of fishing in tidal water. On this fundamental question the House was divided. The Earl of Loreburn, L.C., supported by Lords Ashbourne and Shaw of Dunfermline, felt that it would be wrong after such a right had in fact been exercised for several hundred years to say that everyone exercising it had been trespassers. On the other hand, the Earl of Halsbury, supported by Lords Macnaghten and Gorell, took the view that no amount of user could render lawful a right unknown to the law, and that prescription for a commercial *profit à prendre* without stint is a right unknown to the law. As one might expect, the arguments on so fundamental a point were moral rather than legal and were very nicely balanced. When the six learned lords mentioned above delivered their opinions, Lord Kinnear, the seventh member of the House before whom the appeal had been argued, was absent. Some days later the Lord Chancellor intimated that Lord Kinnear agreed with Lord Halsbury. No reasons were given. The judgment of the Court of Appeal was therefore affirmed. But with all respect one cannot pretend that such a decision given by a majority of four to three and without any report of the reasoning which actuated one of the members of the majority, is entirely satisfactory. It is, I think, quite clear, having regard to *Goodman v. Sallash Corporation*, that the courts will on occasion go to considerable lengths to find a legal origin for rights long exercised, however peculiar they may be. It also appears to be common ground that a *profit à prendre* can exist in gross. It thus seems that the only factor which defeated the claimants in *Harris v. Chesterfield* was that they claimed as owners of certain closes, and thus tied themselves to a position in which they were bound to set up a right connected with their closes. If they had claimed as successors in title of grantees in gross they would apparently have succeeded even though the right was without stint. The position is therefore paradoxical. If the claim to a profit is such that it is connected with a dominant tenement the law will apparently judge it on the same principles as it judges a claim to an easement and will thus protect the servient tenement by limiting the enjoyment of the right. On the other hand, if the claimant sets up something far more onerous, a profit in gross, the law will apparently not be deterred by the onerous nature of the claim from upholding it. It is difficult to see the reason for such a distinction or to believe that the distinction itself is satisfactory.

## Correspondence.

### Third Party Insurance and the Crown.

Sir.—I have read with some interest your observations and reports on this subject (*ante*, pp. 58, 65).

It seems to me, however, that the real difference between Crown and non-Crown cases is that in the latter the injured party has an opportunity of testing before the courts the often very difficult and complicated question of whether or not the driver was acting within the scope of his employment, whereas, in the former this issue is decided by the soldier's commanding officer, who, more often than not, is wholly unqualified to decide the issue.

London, N.W.1.  
9th March, 1942.

F. A. Cox.

## Parliamentary News.

### PROGRESS OF BILLS.

#### HOUSE OF LORDS.

Landlord and Tenant (Requisitioned Land) Bill [H.C.].  
In Committee.

#### HOUSE OF COMMONS.

Land Drainage Provisional Order Bill [H.L.].  
Read First Time.

[10th March.]

[5th March.]

## Landlord and Tenant Notebook.

### Sub-letting by Statutory Tenant.

In the period which followed the Great War, when the housing shortage was most acute, there was probably no class of landlord who felt themselves so aggrieved as those whose protected tenants sub-let the whole or parts of the demised premises at profit rentals. But, one by one, remedies were either found (by the more enterprising landlords) or supplied (by amending legislation), and now that more property is controlled than ever, and shortage of accommodation has made itself felt in some districts and is likely to spread, a short review of the position may be useful.

The protected tenant may sub-let the whole or part, and may let unfurnished or furnished. The position when the whole is sub-let may be briefly dealt with. The Rent and Mortgage Interest Restrictions Act, 1923, s. 4, amended s. 5 (the "possession" section) of the then "principal Act," i.e., the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, adding the following ground for possession: "(h) the tenant without the consent of the landlord has at any time after the thirty-first day of July, nineteen hundred and twenty-three, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let." This was re-enacted in Sched. I. of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933; and the "modification" effected, for the purposes of property which became protected on 1st September, 1939, by Sched. I. of the Rent and Mortgage Interest Restrictions Act, 1930, runs: ". . . for the reference to the 31st July, 1923, there shall be substituted a reference to the date of the passing of this Act."

But it was mostly the sub-letting of part that caused landlords to feel that they were selling at a restricted price to a purchaser who could resell in a free market; the sub-tenant could, but might not, have his own standard rent apportioned, but even the steps taken by legislation to ensure that he should be aware of his rights (information in rent-books) did not always have this effect. However, the 1923 Act above mentioned enacted, by s. 7 (1): "Where part of a dwelling-house . . . is lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies, then, in addition to any increase permitted by, etc., an amount not exceeding ten per cent. of the net rent of the dwelling-house comprised in the sub-tenancy shall be deemed to be a permitted increase in the case of that dwelling-house, and an amount equivalent to five per cent. of the net rent of the dwelling-house comprised in the sub-tenancy shall be deemed to be a permitted increase in the case of the dwelling-house comprised in the tenancy . . ." The second subsection authorises landlords to request particulars of sub-lettings in writing. (A proviso was added to the first subsection by the 1938 Act, but its subject-matter is outside the scope of this article.)

Now, while few of the newly controlled tenancies have become statutory tenancies as yet, it is of importance to note that the above provision is not made applicable to them (1939 Act, Sched. I.). Possibly the Legislature decided to cross that bridge when it comes to it; or it may have been influenced by the consideration that many of the tenancies to which protection has now been extended are held under leases and agreements containing covenants against sub-letting. Breach of covenant has, of course, always been a ground for possession.

There remains the case of sub-letting part of the demised premises furnished, which has an interesting history. The old principal Act defined the scope of the legislation by reference to the expression "dwelling" and to rent and rateable value, but excluded "a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture" (1920 Act, s. 12 (2) and proviso (i)); the 1939 Act, after continuing the protection of those dwellings which had not become decontrolled, deals with dwellings of specified rateable values and again excludes furnished lettings, using the same language (s. 3 (2) (b)). Now a series of decisions, based substantially on the proposition that the Acts applied to houses rather than to persons, developed the rule that when a statutory tenant sub-let part of the premises and the sub-tenant used them for business, the (superior) landlord could recover possession of that part, as it was not protected; and a parallel series of authorities showed that part sub-let furnished could likewise be recovered. The latter series began with *Proud v. Hunter* [1924] 2 K.B. 736 (C.A.) (in which the principle was indicated—for the whole of the premises was sub-let, and the landlord recovered possession of the whole) and culminated in *Barrell v. Fordree* [1932] A.C. 676, in which it was held that the superior statutory landlord was entitled to possession of three rooms sub-let furnished to one sub-tenant and two rooms sub-let furnished to another, leaving his tenant the one room and scullery she had retained, rent to be apportioned.

There is one point which should be borne in mind. The Acts operate by conferring a status upon premises, and if that status can be lost it can be re-acquired. *Leslie & Co. v. Cumming* [1926] 2 K.B. 417—one of the series of decisions to which I have referred—is authority for the proposition that if a landlord, on discovering that his statutory tenant is making a profit rental by sub-letting

either the whole or part of the premises, 'does not act promptly, he may be too late. The facts of the case, so far as relevant, were that a flat was sub-let successively to two sub-tenants, and then some rooms in it were sub-let to one S; the landlords issued a plaint claiming possession of the whole of the premises (they relied mainly on breach of a covenant against sub-letting, but on this point it was held that it was not reasonable to grant an order). The claim failed as regards the letting to S. because they claimed the whole, while as regards the previous lettings "the fact that a house has been let furnished for a period which has expired before proceedings are commenced cannot be relied upon as taking the house out of the protection of the Act in the way which is suggested," said MacKinnon, J.

## Our County Court Letter.

### The Definition of a Tenant's Family.

In *Toy v. Skinner*, recently heard at Exeter County Court, the claim was for possession of a house, the tenant of which had died in 1938. The plaintiff admitted having received rent, both before and after the tenant's death, from a lady, believed to be his wife. It transpired, however, that the lady was only the sister-in-law of the late tenant. Being neither his widow nor a member of his family, the defendant was a trespasser. The case for the defendant was that she went to live in the house in 1912, after the death of the tenant's wife. The defendant had managed the home ever since, and had brought up the tenant's children, one of whom still lived there. The defendant was therefore a member of the late tenant's family; alternatively, a fresh tenancy had been created by the acceptance of rent. His Honour Judge Thesiger held that a sister-in-law was not a member of a family. The latter expression meant a blood relation, but not necessarily every blood relation. If the late tenant's daughter had been advanced as the tenant, she would have been protected. This course, however, had not been taken. Nevertheless, rent had been accepted from the defendant, who had made no attempt at deception. If the plaintiff had known of the relationship, it was not clear that she would at once have terminated the tenancy. In view of the acceptance of rent, and the absence of a notice to quit, judgment was given for the defendant, with costs.

In *Jones v. Morrey*, recently heard at Hanley County Court, the claim was for possession of a house, which had been let to the defendant's husband in 1938. In April, 1941, her husband had deserted the defendant, who nevertheless remained in occupation of the house. There were three bedrooms, and in war-time the house should be used by more than one person. Offers of rent had therefore been refused. The defendant's case was that the magistrates had granted her a maintenance order, but the amount was reduced in consideration of her being allowed the use of the house and furniture. Having remained in possession, with the implied consent of her husband, the defendant had a common law right to continue in occupation. To allow the wife to remain in the house, furnished as it was, was tantamount to sub-letting it. The husband had only given notice to quit after a dispute arose over arrears of maintenance. His Honour Judge Finnemore observed that the legislature had provided for the continuance of a tenancy in favour of a widow. No provision had been made, by statute, for a deserted wife, and she had no rights at common law under the tenancy. An order was made for possession in one month.

### SOLICITORS' BENEVOLENT ASSOCIATION.

A meeting of the Board of Directors of the Solicitors' Benevolent Association was held on Wednesday, 4th March, at 60, Carey Street, Chancery Lane, W.C.2. Mr. Reginald Bullin, T.D., J.P. (Portsmouth), was in the chair, and the following Directors were present: Mr. Gerald Addison (Vice-Chairman), Mr. A. J. Cash (Derby), Mr. T. G. Cowan, Mr. C. H. Culross, Mr. T. S. Curtis, Mr. P. Stormonth Darling, Mr. R. Farmer (Chester), Mr. W. Leslie Farrer, Mr. Gerald Keith, O.B.E., Mr. A. F. King-Stephens, Mr. G. F. Pitt-Lewis, Mr. A. M. Welsford and Mr. Henry White (Winchester).

The Chairman referred to the deep loss sustained by the Association owing to the death of Sir Edmund Cook, and the following resolution was passed, the members standing in silence:—

"The Directors of the Solicitors' Benevolent Association have heard with deep regret of the death of their esteemed colleague, Sir Edmund Cook, C.B.E., LL.D., and they desire to tender their sincere sympathy to Lady Cook and to put on record their appreciation of the devoted service given to the Association by Sir Edmund as Director from 1917 and Chairman in 1932-1933. It was largely due to his personal efforts that local committees were established throughout the Provinces, and these have been of inestimable value in extending the Association's scope and usefulness."

The Chairman also referred to the death on 25th February of Mr. Sydney Cozens-Hardy, of Norwich, who had been a Director since 1888, and a very good friend to the Association.

Grants amounting to £951 15s. were made from the general funds to seventeen beneficiaries, pensions and grants amounting to £204 were made from the Swann Pension Fund to three beneficiaries, and grants of £15 15s. and £10 were made from the Coward Fund. Total £1,181 10s. Six new members were admitted.

## To-day and Yesterday.

### LEGAL CALENDAR.

**9 March.**—One day William Alcock, a miller of Bourne, deserted his wife leaving her destitute. He settled at Colchester, prospered and married again. Then a millwright whom he had dismissed went off cherishing such a grudge as to search Lincolnshire till he found his master's wife. The parish authorities, who were supporting her, tracked him down and he agreed to take her back with him to Colchester. So, eighteen years after his desertion, he set off on horseback carrying her on the pillion. Next day she was found strangled in a ditch eight miles away. He was convicted of murder and hanged at Northampton on the 9th March, 1733. He refused to pray or confess his crime, drank heavily and on the way to the gallows sang an old song of Robin Hood with the chorus *Derry, down, down*. He swore and kicked at everyone in reach, asked some of the spectators to drink to his good journey and to the last declared the injustice of his case.

**10 March.**—On the 10th March, 1832, John Thomas was tried at the Lancaster Assizes for the murder of Ellen Bancroft, the servant at a house in Breck Lane, Everton. She had been found by her employer's nephew sitting on a chair in the kitchen with a wound above her right ear and soon afterwards she had died. A drawer had been forced open and some silver spoons stolen. A man working next door had seen someone whom he believed to be the accused standing at the door of the house and wearing light coloured clothes. A Liverpool pawnbroker, with whom some of the spoons had been pawned, said he believed it was the prisoner who brought them. In the room where Thomas lodged the police found a chisel of a size corresponding to the marks on the drawer and also a leaded "life preserver." His light coloured clothes were found to have been given to a woman to wash. He was convicted and hanged.

**11 March.**—Early in the last century young hooligans discovered a new sport called "giving the girls a squirt." This consisted of filling a syringe or bottle with vitriol or some other corrosive liquid and throwing it on to the clothes of women in the street. The sudden disintegration of the garments so treated afforded them great amusement. On the 11th March, 1811, Edward Beazley, a boy of thirteen employed by a chemist on Ludgate Hill, was tried at the Old Bailey for wilfully and maliciously injuring the apparel of three ladies in Fleet Street. He was convicted and sentenced to be well whipped in Newgate.

**12 March.**—Jack Bird's parents were decent Lincolnshire folk who apprenticed him to a baker, but he absconded, joined the Guards and saw active service in Flanders. Eventually he deserted, resorted to theft, was imprisoned by the Dutch, who dealt ingeniously with his idleness by fastening him in a deep cistern and turning on the water so that he had to pump literally for dear life. Back in England he turned highwayman, having the usual ups and downs and some amusing adventures. Once he stopped a tough old pilot who, having lost both hands in battle, invited him to help himself to the money in his pocket, and then seizing the chance, clasped him round the neck with his arms, fell on top of him and mauled him with his spurs (for, despite his disability, he was riding). Another time Bird stopped the coach of an eccentric earl, who offered to box him for his money. The nobleman's equally eccentric chaplain insisted on taking on the fight, but was beaten thoroughly in fifteen minutes. At last Bird was convicted of a robbery in the Strand, taking all the blame to save a woman, and hanged at Tyburn on the 12th March, 1690. He said little but to inveigh against lewd women and advise young men to follow the rules of virtue.

**13 March.**—Buck Ruxton (originally Bukhtyar Rustomji Ratanji Hakim), an Indian doctor practising at Lancaster, jealous, highly strung and passionate, killed and cut up the woman who passed as his wife and the nursemaid who looked after his children. The dismembered remains he threw into a ravine near Moffat, on the Edinburgh road. To neighbours he pretended to think that the women had run away. The reconstruction of the bodies makes the case a medico-legal classic. Ruxton was tried before Mr. Justice Singleton at the Manchester Assizes, and sentenced to death on the 13th March, 1936.

**14 March.**—Thomas Tawell is known as "the Quaker murderer," but he had in fact been expelled from the Society of Friends. Still, he continued to wear their garb even when he stood in the dock at the Aylesbury Assizes charged with murder. By building schools and establishing savings banks he had been able to preserve a facade of piety and benevolence in the use of his wealth, but he had got himself entangled with a woman named Sarah Hart, and was obliged to make her an allowance. To rid himself of this encumbrance he resorted to prussic acid. He admitted that he had been to her house shortly before her death but said that he had seen her pour something into a glass from a small phial as if she meant to poison herself. The ingenious theory of his counsel that she poisoned herself through eating too many apple-pips earned him the life-long nickname of "Apple-pip" Kelly, but did not save his client. The trial ended on the 14th March, 1845, Tawell being convicted and condemned to death.

**15 March.**—Wood, in his *Athenae Oxonienses* tells us that "William Hart, a most zealous young man for the Roman Catholic cause, was born in Somersetshire, entered in his puerile years into Lincoln College in 1572, where after he had been instructed in grammar and logic, left it without a degree, his relations and country and going beyond the seas to Douay completed his studies in philosophy." Having been ordained, he returned to England to minister to the Catholics and was "hanged, drawn and quartered, for being a Roman priest, at York on the 15th March, 1583." At the gallows he cheerfully ascended the ladder and began to pray in silence. When asked if he prayed for the Queen, he said that he had always done so and would not cease as long as he lived.

#### INTERNAL DISAGREEMENTS.

At Leeds Quarter Sessions recently the foreman of a jury was announcing a verdict of guilty when signs of disagreement were seen among the jurymen. They retired for further consultation, and when they returned the verdict was an acquittal. It has always been something of a mystery to those who have never sat on juries how twelve men can be brought to agree unanimously on anything, but stories get about of some of the methods adopted. A New Zealand jury once were agreed that there should be a conviction, but one man held out, saying: "The accused is a cobber of mine, and if I have to sit here all night, I won't agree to a verdict of guilty." But the foreman was equal to the occasion. "Gentlemen," he said, "we will now return to court and I will inform the Registrar that we are unanimously agreed upon a verdict of guilty, and," he added turning to the dissentient, "if you dare to open your mouth I'll tell the judge what you've said in this room." He was not interrupted. In one Lancashire case, however, it was the twelfth man who got his way. "It was eleven to one against me," he said afterwards, "but I told 'em I would sit there all night till they came round to my way of thinking and as it came near closing time they came round one by one, and it did not make it any easier for 'em when I brought out my flask and had a swig." The circumstances must have been somewhat similar in the case of the American jury whose foreman, when asked what they would have to eat, said to the sheriff: "Waal, you can bring us eleven dinners—and a bale of hay."

#### Reviews.

**The War Damage Act, 1941.** By R. M. MONTGOMERY, K.C., M.A. (Oxon), Recorder of Chester. 1942. Medium 8vo. pp. xxxvi and (including Index) 356. London: Eyre and Spottiswoode. 30s. net.

In his preface, written in November, 1941, the learned author draws attention to a tendency which he describes as consonant rather with present German or Russian, than with British ideas of judicial functions. This is in reference to the fact that, having set up a commission with semi-judicial duties, Parliament has allowed bureaucracy to keep the commission in leading strings by means of Orders in Council, Treasury Regulations, Treasury Orders and, most significant of all, Treasury directions. The learned author is thus led to wonder how legislation in a complex state of society will be conducted, when times of peace return. In the meantime he has provided a valuable contribution to the solution of present problems by means of the above work. This comprises the complete text of the War Damage Act, 1941, fully annotated, together with the Trustee (War Damage Insurance) Act, 1941, the War Damage (Extension of Risk Period) Act, 1941, an introductory explanation of the Acts, and an appendix of relevant Statutes, Orders and Regulations. The War Risks Insurance Act, 1939 (which deals with commodity insurance or insurance of trading stocks) has been amended by the War Damage Act, 1941, and appears as now amended in the appendix. The latter also includes statutes, such as the Diplomatic Privileges (Extension) Act, 1941, which bear directly on the War Damage Act. The book is clearly printed on good quality paper, and the author and publishers have combined to produce a volume which will satisfy the most exacting requirements of property owners and their professional advisers.

**The Law of Conveyancing in British India.** By S. K. DUTT, Advocate of H.M. High Court of Judicature at Allahabad. 1941. Royal 8vo. pp. x and (including Index) 874. Allahabad: Universal Law House. £1 6s. net, or Rs.12.

In a praiseworthy endeavour to raise the art of conveyancing in India to the high level attained by it in this country, the learned author deals exhaustively with its principles and precedents. As a matter of fact, English practice is the mother and model of this as well as of other offshoots of Indian law. The method followed is rational, and the exposition of the rules of draftsmanship clear.

There are two editions of this work, and both books are equally good; one is for professional use in chambers, and the other for the benefit of students.

The Hon. Sir John Anthony Hawke, Judge of the High Court of Justice, King's Bench Division, left £6,078, with net personalty £5,743.

#### Notes of Cases.

##### COURT OF APPEAL.

*In re Ezekiel's Settlement Trusts; National Provincial Bank, Ltd. v. Hyam.*

Lord Greene, M.R., Luxmoore and Goddard, L.J.J. 19th January, 1942. Trust—Compromise approved by trustees—Adult beneficiaries and guardian ad litem of infant beneficiaries object to compromise—Power of court to approve compromise—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 15 (f). Motion.

By a marriage settlement, dated the 20th October, 1932, made between E, his daughter and her husband, E covenanted to transfer to trustees approximately £15,000, to be held on the usual trusts for the benefit of the daughter, her husband and issue. The daughter duly married and there were two children of the marriage. The £15,000 was never paid by E, and in 1939 his daughter, her husband and children started an action for specific performance of the covenant. An order was made for payment of the £15,000, and pursuant to the order, the applicant bank was appointed trustee of the settlement. At the time of the order E was out of the jurisdiction and he did not return until 1940, when a bankruptcy notice was served with a view to compelling him to comply with the order of 1939. In November, 1940, the bank, as the trustee of the settlement, took out a summons asking for directions whether it should attempt to compromise the claim against E. His daughter, her husband and children were respondents to the summons. In January, 1941, the bank and E reached agreement and the summons was amended to ask the court to sanction it. The beneficiaries objected to the compromise. Counsel, however, on behalf of the infants, advised that it was their benefit and in June, 1940, Farwell, J., approved the compromise and ordered it to be carried into effect. The husband moved to set aside that order on the ground that as he and his wife and the guardian ad litem of the infants refused to agree to the compromise, the court had no jurisdiction to sanction it. He relied on *In re Birchall*, 16 Ch. D. 41, Bennett, J., held that that authority did not apply to the present case. The trustees had, under s. 15 (f) of the Trustee Act, 1925, power to settle any differences relating to the trust. The court was now asked to exercise on their behalf their discretion under the Act. In all the circumstances he had come to the conclusion that the settlement was for the benefit of the infant children and should be approved. The husband appealed.

LORD GREENE, dismissing the appeal, said that the court had jurisdiction to sanction the compromise. Attention should be paid to the views of the beneficiaries. The court must, however, regard the interests of all parties, including those of infants. The court, having decided in this case that the infants would benefit by the compromise, had authorised the bank to proceed with it. The Court of Appeal would not interfere with the exercise of a discretion which had been duly exercised.

LUXMOORE and GODDARD, L.J.J., agreed.

The appellant appeared in person; Lightman, for the bank.

SOLICITORS: Nash, Field & Co.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

#### CHANCERY DIVISION.

*In re Drage's, Ltd.*

Bennett, J. 26th January, 1942.

Companies—Memorandum of association—Company ceases to carry on business—Company seeks to alter objects in memorandum—Jurisdiction of court to sanction alteration—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 5 (1) (d).

Petition.

D, Ltd., by this petition, applied under s. 5 of the Companies Act, 1929, for the confirmation by the court of an alteration in its memorandum of association. The company had been incorporated in 1926, its principal object in its memorandum of association being to carry on the business of house furnishing. This business the company carried on the hire-purchase system. In 1936 the company entered into an agreement with G, Ltd., whereby that company took over the company's business and collected on its behalf the outstanding hire-purchase debts. After the outbreak of the war G, Ltd., were unable to carry on and under the agreement the business reverted to the company. The company was not in a position to restart the business, but its directors were satisfied that the company probably could do so advantageously after the war. In these circumstances, as the company had £321,300 cash in hand and investments valued at £119,360, it sought to alter its memorandum of association by taking power to carry on a trust investment business. Section 5 (1) of the Companies Act, 1929, permits a company, with the sanction of the court, to alter the provisions of its memorandum of association to enable it "... (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company."

BENNETT, J., said that it was suggested that the collection of the outstanding book debts in respect of the past trade was a business which the company was carrying on. He did not accept that view. He considered the evidence showed that the company had ceased to trade. The alteration of the memorandum was desired solely for the purpose of enabling the company not to come under a liability for income tax, if it were fortunate enough to make capital profits as a result of the investment of the cash which it was now unable to employ. He did not consider that there was any business being carried on by the company with which the business of a trust investment company could either conveniently or

advantageously be combined. Accordingly, the company had not brought itself within the provisions of s. 5, and the petition must be dismissed.

COUNSEL : *M. L. Gedje.*

SOLICITORS : *Harris, Chetham & Cohen.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

**Is re General Mortgage Society (Great Britain), Ltd.**

Bennett, J. 2nd March, 1942.

*Companies—Meeting of debenture-holders approving scheme of arrangement—Official Receiver appointed as proxy—Validity of appointment—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 153—Companies Winding-up Rules, 1929, r. 150.*

Petition.

By this petition N., Ltd., a company being wound up by the court, and the Official Receiver, sought the sanction of the court under s. 153 of the Companies Act, 1929, to a scheme of arrangement with its debenture-holders. Pursuant to an order of the court, three meetings of three separate classes of debenture-holders had been held on the 15th January, 1942, and the proposed scheme had been then approved by all three classes. At those meetings certain debenture-holders had appointed the Official Receiver as their proxy. The Registrar had raised the question whether these proxies were valid.

BENNETT, J., said that it was suggested, having regard to the decision of Sir George Jessel, M.R., in *In re Madras Irrigation and Canal Company* (1881), W.N. 120, and of Buckley, J., in *In re Central Bahia Rly Co., Ltd.* (1902), 18 T.L.R. 503, that the proxies were invalid because the Official Receiver was not a member of the class or classes of creditors convened to the meeting ordered by the court. At the time of those decisions the rule in force was r. 46 of the General Order and Rules of the Court of Chancery under the Companies Act, 1862. Those regulations had been annulled and r. 150 of the Companies Winding-up Rules, 1929, now applied. Under that rule it seemed plain that at meetings such as those convened by order of the court, the creditors had the right to appoint as their proxy the Official Receiver and the decisions of Sir George Jessel and Buckley, J., had no longer any effect. Accordingly, the suggestion that these proxies were invalid was unfounded and he would sanction the scheme.

COUNSEL : *H. E. Salt.*

SOLICITORS : *Stafford Clark & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

**KING'S BENCH DIVISION.**

**Hathaway (Inspector of Taxes) v. Turner.**

Lawrence, J. 29th September, 1941.

*Revenue—Income tax—Town clerk—Change of employers—Whether “ceases to hold office”—Additional assessment—Validity—Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 45 (5).*

Case stated by Commissioners for the General Purposes of the Income Tax Acts.

The respondent appealed to the Commissioners against an additional assessment to income tax of £50 made on him under Sched. E to the Income Tax Act, 1918, for the year 1938-39 in respect of his employment as deputy town clerk of Rotherham. In 1931 he was appointed assistant solicitor to Leicester Corporation at a salary rising from £185 9s. a year. In December, 1933, he was appointed town clerk of Aberystwyth at £600 a year. No additional assessment was then made on him under s. 45, subs. (5), of the Finance Act, 1927, on the basis that he had ceased to hold an office or employment. In November, 1936, he was appointed deputy town clerk of Rotherham at £700 a year, again no additional assessment on the basis of a cessation of office being made. As from the 27th January, 1939, his salary was £800 a year, and on the 28th September he was appointed town clerk of Scarborough at a salary beginning at £1,000 a year. He was originally assessed at £709 for the year 1938-39 in respect of his remuneration as deputy town clerk of Rotherham, that being the sum received during the year ending the 5th April, 1938. His actual remuneration for the year ending the 5th April, 1939, being £759, the additional assessment under appeal was made on the footing that, there having been a cessation of his office, he was by virtue of s. 45 (5) of the Act of 1927 assessable on the actual amount of his remuneration in the year ending the 5th April, 1939 preceding the year of assessment (ending the 5th April, 1940) in which the cessation of his office of deputy town clerk of Rotherham occurred. He gave evidence that for the previous eight years he had been performing the same class of work, whether as town clerk or deputy town clerk, and that, excepting rare occasions, the only way of obtaining promotion in offices such as his was to accept posts under different local authorities when opportunity offered. It was contended on his behalf that there had on his appointment as town clerk of Scarborough been no cessation of office to attract s. 45 (5), and that he should be assessed on the basis of a continuing office. It was contended for the Crown that there had been a cessation of office, the nature of his employment having changed because he had risen from being a deputy town clerk to being a town clerk, and also because there was a change in the local authority employing him; that there had accordingly been a cessation of his office when he ceased to be deputy town clerk of Rotherham; and that the additional assessment should stand. The Commissioners held on the facts that there had been no cessation of office and consequently discharged the additional assessment. The Crown appealed.

LAWRENCE, J., said that it was irrelevant that on the respondent's previous changes of office the revenue authorities had not elected to apply the principle of cessation of office. The facts in *May v. Falk.*, 17 T.C. 218, on which the respondent principally relied, were quite different.

The employers were throughout the same company. The Crown relied on *Thomas v. Inland Revenue Commissioners*, where the taxpayer was employed by a firm which was turned into a limited company, he being then employed by the company at a different salary and with certain extended duties. The Commissioners there decided that there had been a cessation of the taxpayer's office. The majority of the Court of Session held that the mere fact that there has been a change of employer was sufficient to establish that there had been a cessation of employment. The respondent contended that that case was distinguishable from the present and was consistent with his main contention, namely, that this matter was a question of fact on which the decision of the Commissioners ought to be affirmed. The alleged fact that civil servants were not treated as ceasing to hold their old office and beginning to hold a new one when they changed offices under the Crown was irrelevant. The argument that the respondent was carrying on the same work now as before was ill-founded. The fact that the work was similar in its nature did not mean that it was the same work. The majority in the Court of Session were right. It was clear from r. 6 (j) of the rules applicable to Sched. E to the Income Tax Act, 1918, that offices or employments of profit under a local authority were taxable under that schedule, and a person who had ceased to be employed by a local authority could not be said not to have ceased to hold the office or employment of profit which he was holding under that authority. The appeal must be allowed.

COUNSEL : *R. P. Hills;* the respondent appeared in person.

SOLICITOR : *The Solicitor of Inland Revenue.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

**Lusty Barrинг & Co., Ltd. v. Guilliet, Sons & Co., Ltd.**

Hallett, J. 13th January, 1942.

*Contract—Sale of goods—Condition excluding cancellation for delay in delivery—Whether “reasonable” delay implied.*

Action to recover £172 as money received by the defendants to the use of the plaintiffs.

In February, 1941, the plaintiffs ordered goods from the defendants and paid £172 on account of the price. The order was subject to the terms, among others, that the vendors did “not pay any indemnity for delay, unless specifically agreed upon at the time of the order,” and that “a delay in delivery does not give the purchaser the right to cancel the order.” The goods not having been delivered, the plaintiffs issued the writ in this action on the 7th July, 1941. The defendants pleaded that they had failed to deliver the goods through causes beyond their control, and that they were and always had been ready and willing to deliver the goods when they were able to do so. They therefore contended that the plaintiffs were not entitled to the return of the deposit.

HALLETT, J., said that counsel for the plaintiffs had argued that, in spite of the conditions about delay, the delay which had taken place gave them the right, which they had exercised, to cancel the contract. The first ground for that contention was that no delivery date was specified in the contract; in other words, a purchaser who failed to have any delivery date inserted in the contract was in a better position than the purchaser who did, because in the latter event the conditions about delay operated in favour of the supplier, whereas in the former they did not. It was, however, clear that the plaintiffs, in order to succeed, must first get the court to imply a delivery date, and if the court implied a date earlier than the 7th July, the conditions about delay would apply to that date. The second contention for the plaintiff, equally bold, was that “a delay in delivery does not give” was not the same as “no delay does give”; and that “a delay” was different from “any delay,” and meant a reasonable delay. His lordship saw no reason for inserting any word into the condition. The action failed. His lordship added that the plaintiffs would not, in his opinion, have established frustration had it been pleaded.

COUNSEL : *Fortune; Rawlins.*

SOLICITORS : *Hogan & Hughes; Outred Maclean & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

**COURT OF CRIMINAL APPEAL.**

**R. v. Wattam.**

Viscount Caldecote, C.J., Humphreys and Asquith, J.J. 24th October, 1941.

*Criminal law—Evidence—Identification—Evidence by police officer that prisoner's photograph seen in book of photographs—Jury warned against drawing unfavourable inference—Procedure where irregular evidence admitted.*

Appeal from conviction.

The appellant was convicted of shop-breaking and stealing furs, and sentenced to seven years' penal servitude. A police constable gave evidence that at 10 p.m. on the 27th March, 1941, he saw the appellant leave the shop and jump on to the footboard of a motor car, and that he (the constable) was able by shining his lamp on to the car to obtain a view sufficient for the identification of the appellant. The main ground of appeal was that the trial was vitiated because the police constable in his evidence referred to a photograph of the appellant, the question of identification being a critical one in the case. The constable stated that he had seen the face of the man of whom he caught a glimpse on the 27th March among photographs produced to him in the police court on the 28th. There was no application by counsel for the defence, after that evidence was given, that the jury should be discharged and a new trial instituted. In his summing-up the trial judge referred to the constable's evidence about the photograph and said: “Remember that the suspicions of the policeman . . . had been aroused on that night and that on the next morning he was looking at a book of photographs to try and identify this man . . . Books of photographs are supplied . . . of perfectly respectable people and they

are often used for these purposes, and you must not assume that there is anything untoward in a policeman's looking at a book of photographs . . . you must not assume against the accused man that it was a book of photographs of convicted persons . . ."

LORD CALDECOTE, C.J., giving the judgment of the court, said that there was ample evidence, apart from the question of identity, of the appellant's responsibility for the theft. Photographs could be properly and improperly used in criminal proceedings. The judge here had directed the jury in clear terms that they must not assume that there was anything discreditable to the appellant in the fact that the constable had seen his photograph in the book of photographs. The court were far from satisfied that the original mention of the photographs would have had any effect at all on the jury, who were not persons versed in the practice of the criminal courts, but in any event everything possible had been done to correct any improper inferences. Counsel had referred in argument to *R. v. Peckham* (1935), 25 Cr. App. Rep. 125, on the proper procedure to be followed where evidence had been wrongly admitted. In the former case it was laid down that three elements must be found in a case before the Court of Criminal Appeal would quash a conviction recorded after the receipt of irregular evidence: (1) statements concerning, for example, a prisoner's record and made inadvertently from the witness-box; (2) prejudice to the prisoner from those statements; and (3) an application by counsel for the appellant for another trial before a different jury. In *R. v. Peckham* the Lord Chief Justice said twice that such an application by counsel at the trial was essential. To quash the conviction here would be going far beyond that case. The appeal failed.

COUNSEL: *R. H. Blundell; R. E. Seaton.*

SOLICITORS: *The Registrar of the Court of Criminal Appeal; The Director of Public Prosecutions.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

#### R. v. Hammond.

Viscount Caldecote, C.J., Humphreys and Lewis, JJ. 27th October, 1941.  
Criminal law—Evidence—Confession—Admissibility—Allegation that confession extorted—Cross-examination as to its truth—Validity.

Appeal from conviction.

The appellant was convicted before Cassells, J., of the murder at Dover on the 3rd July, 1941, of one Roberts, and sentenced to death. The appellant was an operator, eighteen years of age, at a cinema of which Roberts was the manager. It was alleged that the appellant murdered him by striking him on the head with an axe, and that he threw the body out of a window and hid it in a disused lumber-room. The appellant's account of his movements on the evening of the 3rd July not having tallied with the times given, the police asked him if he could give any further information. According to the three police officers who interviewed the appellant, he, after a pause of several minutes, then gave them a detailed account of how he had committed the crime, and told them a number of facts unknown to them, including places where he had hidden the money which he had taken from the safe at the cinema. The police duly found the money in those places. It became evident during the opening of the case for the prosecution that counsel for the Crown desired to mention to the jury a full and detailed statement made by the appellant to the police of how he had committed the crime. Counsel for the appellant objected, and, the jury having been sent out of the court, evidence was called to establish the entirely voluntary nature of the appellant's statement. The appellant then alleged in evidence that the confession had been extorted from him. He was then cross-examined by counsel for the Crown, who had no idea that the appellant would again confess to the crime. To counsel's second question, namely, whether the statement was true, the prisoner had replied "Yes." Counsel then put two or three more questions to make sure that the prisoner meant that. Subsequently the jury had the confession read to them as part of the case for the prosecution. The appellant did not give evidence, and the jury convicted him, as they were bound to do. Counsel submitted that the appellant ought not in cross-examination before the judge, the issue being the admissibility of the statement, to have been questioned as to its truth.

HUMPHREYS, J., giving the judgment of the court, said that the ordinary practice was that, if there were any objection on the part of the defence to the admissibility of a piece of evidence, it should not be opened to the jury. The court desired to reiterate that that practice should be adhered to, certainly in most cases. The appeal was brought on the sole ground that counsel's question about the truth of the statement was inadmissible. In the opinion of the court it was clearly admissible. It was relevant to the story which the appellant was telling about how his statement had come to be made; it went to the credit of the person who was giving the evidence. The contents of the statement which the appellant had admittedly made and signed were relevant to the question how he came to make and sign it. The question was rightly put and therefore could not have wrongly affected the judge's mind. The appeal would be dismissed.

COUNSEL: *Waddy; McClure.*

SOLICITORS: *The Registrar of the Court of Criminal Appeal; The Director of Public Prosecutions.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

The Board of Trade announce that they have made Regulations further postponing the latest date for the lodgment of applications for licences under the Prevention of Fraud (Investments) Act, 1939, from 16th March, 1942, until 15th September, 1942. No applications for licences should be made until the Board of Trade announce that they are prepared to receive them. (By previous Regulations the date has been postponed by six-monthly periods from 15th September, 1939, to 16th March, 1942.)

## Obituary.

### HIS HON. JUDGE DAVIES.

His Hon. Judge William Frank de Rolante Davies, Judge of County Courts, Circuit 31 (Carmarthenshire), died on Saturday, 7th March, on the green while playing golf on the Ashburnham Course, Pembrey. He was educated at Llandovery School and Hertford College, Oxford, and was called by the Middle Temple in 1913. In 1926 he was appointed judge of Circuit 31. He was Chairman of the South Wales Conscientious Objectors' Tribunal and of the Carmarthenshire and the Haverfordwest Quarter Sessions.

### MR. T. BARRINGTON.

Mr. Thomas Barrington, solicitor, of Messrs. Lovibond, Son and Barrington, solicitors, of Bridgwater, died on Monday 23rd February, aged seventy-four. He was admitted in 1890.

### MR. H. L. LEONARD.

Mr. Herbert Longman Leonard, solicitor, of Messrs. Barnett and Leonard, solicitors, of Bristol, died on Monday, 2nd March, aged eighty-one. He was admitted in 1885, and was a past president of the Bristol Incorporated Law Society.

### MR. T. PRIEST.

Mr. Thomas Priest, solicitor, of Messrs. Freeman, Haynes and Co., of Bedford Row, died on Friday, 6th March. He was admitted in 1900.

### MR. L. P. STEELE.

Mr. Leonard Percy Steele, solicitor, of Messrs. L. Percy Steele and Son, of Burnley, died on Wednesday, 25th February, aged seventy-two. He was admitted in 1901.

## War Legislation.

### STATUTORY RULES AND ORDERS, 1942.

- No. 355. **Bahama Islands Prize Court** (Fees) Order in Council, Feb. 23.
- E.P. 357. **Coffee (Returns)** Order, Feb. 28.
- E.P. 347. **Condensed Milk (Distribution)** Order, 1940. Directions, Feb. 27.
- E.P. 361. **Consumer Rationing and Limitation of Supplies (Cloth and Apparel)** Gen. Licence, Dec. 19, 1941. Amendment, Feb. 28.
- No. 352. **Customs** Order, Feb. 28, revoking Licences for Exportation of Scrap and Waste (Rubber).
- E.P. 327. **Display of Photographs** (Cinematograph Film Industry) Order, 1942. Gen. Licence, Feb. 26.
- No. 313. **Export of Goods (Control)** (No. 9) Order, Feb. 24.
- E.P. 337. **Feeding Stuffs (Rationing)** Order, 1942. Amendment Order, Feb. 25, giving Directions.
- E.P. 360. **Food (Restriction on Dealings)** Order, 1941. Order, Feb. 28, re Appointed Day.
- E.P. 340. **Food (Transport)** Order, 1941. Directions, Feb. 26.
- E.P. 370. **Home Guard (Tribunals)** Order, Feb. 24.
- No. 317/L4. **Lancaster** (Court of Chancery). Procedure. Chancery of Lancaster Rules (No. 1), Feb. 11.
- E.P. 329. **Limitation of Supplies (Misc.)** (No. 13) Order, 1941. Gen. Licence, March 1, re Undecorated Earthenware or China.
- E.P. 328. **Rationing Order 1939**. Amendment Order, Feb. 24.
- E.P. 336. **Salvage of Waste Materials** (No. 2) Order, Feb. 25.
- No. 342. **Trading with the Enemy (Custodian)** (No. 2) Order, Feb. 26.
- No. 333. **War Risks (Commodity Insurance)** (No. 1) Order, Feb. 25.

## Notes and News.

### Honours and Appointments.

The King has approved the following appointments:—  
Sir WILLIAM JOWITT, K.C., to be Paymaster-General.  
Major D. P. MAXWELL FYFE, K.C., to be Solicitor-General.

### Notes.

The meeting of the Haldane Society fixed for Monday, 16th March, at which Sir Stafford Cripps was to have spoken on "Our Soviet Allies," has been cancelled in view of his visit to India.

Lord Salvesen, formerly Judge of the Court of Session, who died recently in Edinburgh, directed his trustees to offer £500 as an inducement to Princes Street property owners to clean up the exterior of the buildings. He wrote in his will: "I have always thought it a disgrace that the houses in Princes Street should remain covered with the soot and dirt of fifty years."

In giving judgment in the Court of Appeal recently one of the Lords Justices said: "This was as plain a case as was ever brought. If the learned judge had not achieved the remarkable feat, I should have thought that it would have exceeded the bounds of human prolixity to have delivered a judgment on it which occupied fifteen pages."

### Wills and Bequests.

Mr. Frederick Evelyn Metcalfe, solicitor, of Bristol, left £37,590, with net personality £33,187.

Mr. Charles Edwin Nield, retired solicitor, of Upton Grange, near Chester, left £114,625, with net personality £100,316.

